UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

ST. CATHERINE OF SIENA MEDICAL CENTER
Employer

and Case No. 29-RC-11326

NEW YORK STATE NURSES ASSOCIATION
Petitioner

DECISION AND DIRECTION OF ELECTION

St. Catherine of Siena Medical Center ("the Employer") is an acute-care hospital located in Smithtown, New York. The New York State Nurses Association ("NYSNA" or "the Petitioner") represents a bargaining unit of approximately 350 to 450 registered nurses ("RNs") employed by the Employer there. On March 24, 2006, the Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent approximately five or six nurse practitioners, who are also registered nurses. Specifically, the Petitioner seeks a self-determination election, wherein the nurse practitioners would vote whether to join the existing unit of RNs represented by the Petitioner, or to remain unrepresented. The Petitioner contends that, if the majority of nurse practitioners vote to join the RN unit, then the resulting unit of "all registered nurses" would be appropriate for bargaining under Section 103.30(a)(1) of the National Labor Relations Board's rules on collective bargaining units in the health care industry, 284 NLRB 1580.

The Employer contends that it would not be appropriate to include the nurse practitioners in the existing unit of RNs, and that their only appropriate placement would be in a unit of "all professionals except for registered nurses and physicians." The Employer argues that the nurse practitioners share a closer community of interest with other professionals, such as physicians' assistants, than they do with the RNs.

A hearing was held before Eric Boerschinger, a hearing officer of the National Labor Relations Board. However, in order to avoid unnecessary litigation, which the Board's health-care units were intended to avoid, the Hearing Officer limited the Employer to making an offer of proof as to why the RN nurse practitioners' placement in the unit with other RNs would be inappropriate. The Employer filed a special appeal (Board Exhibit 3)[1] with the undersigned Regional Director, but I denied the appeal (Bd. Ex. 4).

As explained more fully below, I conclude that the petitioned-for self-determination election would create an appropriate unit of "all registered nurses" under the Board's health-care unit rules. I further conclude that the Employer's proffered evidence, even if assumed to be true, does not prove "extraordinary circumstances" sufficient to deviate from the rule. Accordingly, I will direct a self-determination election below among the nurse practitioners.

Background facts

There is no dispute that the Employer runs an acute-care hospital, and that the Board's rules regarding health care bargaining units apply. As noted above, NYSNA

[1] All references to the record will hereinafter be abbreviated as follows: "Jt. Ex. #", "Bd. Ex. #" and "Er. Ex. #" refer to Joint Exhibit numbers, Board Exhibit numbers, and Employer Exhibit numbers, respectively.

already represents a bargaining unit of 350 to 450 registered nurses. (The RNs' 2004 - 2006 contract appears in the record as Jt. Ex. 1.) The RNs' unit includes RN staff nurses, assistant nursing care coordinators, in-service education instructors, care managers, appeals coordinators, and pre-surgical testing nurses. There appears to be no dispute that the nurse practitioners are a "residual" group, i.e., the only other RNs employed by the Employer.[2] None of the Employer's other professional employees are represented for collective bargaining purposes, although there are two non-professional units.[3] The Employer's nurse practitioners work in the ambulatory surgery unit, the pre-surgical testing unit, and the employee health unit.

The parties agreed to the following stipulations of fact: that all nurse practitioners must have a registered nurse license; that all nurses practitioners have additional education (typically two years) beyond what is required for RNs; that nurse practitioners must be certified by New York State as nurse practitioners; and that the Employer also requires nurse practitioners to be certified by a national certifying body.

The Employer employs full-time, part-time and per diem nurse practitioners. The parties agreed to use the Board's eligibility formula for "regular part-time" employees, i.e., that voters must have worked an average of at least four (4) hours per week during the 13-week period prior to the issuance of this Decision. Sisters of Mercy Health Corp., 298 NLRB 483 (1990); V.I.P. Movers, Inc., 232 NLRB 14 (1977).

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2 The parties agreed to exclude from the nurse practitioner group a classification called "hospital extender," which could be filled by either a nurse practitioner or a physicians' assistant.

3 Specifically, District 15 of the International Association of Machinists and Aerospace Workers represents a unit of service, maintenance, engineering and clerical employees (See Jt. Ex. 2). The New York State United Teachers, American Federation of Teachers, represents a unit of technical employees (Jt. Ex. 3).

Employer's offer of proof

The Employer contends that the only appropriate placement of nurse practitioners would be in a unit of approximately 75 to 100 other professionals (other than physicians and registered nurses), such as physicians' assistants, dieticians, pharmacists, physical therapists, recreational therapists, and social workers.

In support of this position, the Employer proffered the testimony of three witnesses (vice president of human resources Joanne Sampson, medical staff coordinator Connie Melniek, and director of outpatient services Elizabeth White) regarding the hiring and credentialing of nurse practitioners, the different functions of nurse practitioners and RNs, and the inability of RNs to substitute for RNs. Specifically, the Employer offered to prove that nurse practitioners must go through more rigorous hiring and credentialing processes than regular RNs. For example, the completed applications for privileges and credentialing (Er. Exhibits 5(a) - (d)), show that nurse practitioners must have Drug Enforcement Agency registration, a written "practice agreement" with a collaborating physician, and malpractice insurance coverage, in addition to the RN license and nurse practitioner certification described above. The only other professionals who must undergo this credentialing procedure are the medical doctors and the physicians' assistants. Furthermore, unlike regular RNs, nurse practitioners must be "re-credentialed" every two years. They must abide by the Medical Staff By-Laws (Er. Ex. 4).

The Employer offered to prove that nurse practitioners are authorized to take a "history and physical" (H & P) from patients prior to their surgical procedure, to write "doctor's orders" sheets, and to prescribe medications and treatments, with the approval

of the collaborating physician. Regular RNs are prohibited by law from performing those tasks. Er. Ex. 2 shows various doctor's orders sheets signed by nurse practitioners.[4] Er. Ex. 3 shows a blank H & P form which nurse practitioners are authorized to complete. In this regard, the Employer argues that nurse practitioners are more akin to physicians' assistants than the regular RNs. When a nurse practitioner is absent or unavailable, she must be replaced by a physicians' assistant (equally authorized to take the patients' H & Ps, and to prescribe medications and treatments) but not a regular RN. Thus, the Employer contends, the nurse practitioners are not interchangeable with the other RNs. In fact, although the Employer does not claim that the nurse practitioners are statutory supervisors, the Employer points out that RNs must follow orders of nurse practitioners (as well as doctors and physicians' assistants) and would be subject to discipline if they failed to do so.

The Employer also offered to prove that although the nurse practitioners report to RN Elizabeth White (who also supervises the other RNs in the ambulatory surgery and pre-surgery testing units) for administrative purposes, they report to their collaborating physician for clinical purposes.

Finally, the Employer offered to prove that it employs only five eligible nurse practitioners. (The sixth, per diem nurse practitioner Marilyn Alter, may not have worked enough hours to be eligible to vote.) The Employer argues that the small size of

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[4] In the offer of proof, the Employer's attorney stated that doctor's order sheets do not need to be approved by the collaborating physician until up to three months later. In its post-hearing brief, the Employer cites the state regulations governing nurse practitioners to the same effect, i.e., that the physician may wait up to three months before reviewing the nurse practitioners' charts. Er. Ex. 2 shows doctor's order sheets dated from April 3 to April 10, 2006, i.e., one or two weeks before the hearing on April 13, 2006. At that time, one of the forms appears to have been signed by only the nurse practitioner. Other forms appear to have been counter-signed by someone else up to a week later. In any event, it should also

this group constitutes an "extraordinary circumstance" warranting an exception to the Board's rules regarding hospital bargaining units.

The Employer proffered no evidence that nurse practitioners share a community of interest with dieticians, pharmacists, physical therapists, recreational therapists, social workers or any other professionals in the Employer's proposed unit. There is no evidence that any labor organization seeks to represent the Employer's proposed unit of other professionals, with or without the nurse practitioners.

The Board's enactment of health care units

After years of case-by-case litigation, the Board decided in 1987 to enact rules regarding appropriate bargaining units in the health care industry. The Board expressly stated that it sought to avoid "continuing lengthy and costly litigation over the issue of appropriate bargaining units in each case." *See* Notice of Proposed Rulemaking ("NPR"), published at 284 NLRB 1516 (1987). The Board engaged in extensive fact-finding and, in 1989, finally established eight appropriate units for bargaining in acute-care hospitals. Specifically, Rule 103.30(a) states in relevant part:

> Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for [representation] petitions…:
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> (1) All registered nurses.
> (2) All physicians.
> (3) All professionals except for RNs and physicians.
> (4) All technical employees.
> (5) All skilled maintenance employees
> (6) All business office clerical employees.
> (7) All guards
> (8) All nonprofessional employees except for technical, skilled maintenance employees, business office and clerical employees and guards.

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be noted that the nurse practitioners' job description states that their progress notes and case summaries for inpatients must be reviewed and counter-signed by the physician within 24 hours.

In American Hospital Assn. v. NLRB, 499 U.S. 606 (1991), the Supreme Court upheld the Board's authority to establish such units via rulemaking rather than case-by-case adjudication.

During the rulemaking comment period, many employers objected to the proposed RN unit, arguing instead that the RNs belong in a broader unit of all professionals. However, after gathering an extensive factual record, the Board found ample reasons to support a separate RN unit. Those reasons included the RNs' unique and round-the-clock interaction with patients (as opposed to other professionals like pharmacists, physical therapists and social workers, who work primarily during day shifts), their common supervision by a nurse (typically a director of nursing), their common licensing requirements, their close and continuous contact with one another, their long history of separate representation, their unique collective bargaining interests (e.g., unique concerns re: staffing, scheduling, night shift differentials and mandatory overtime due to their round-the-clock responsibility for patient care and due to the chronic nursing shortage). *See generally* Second NPR, 284 NLRB at 1543-52.

The Rules allow for alternate units in "extraordinary circumstances," such as a unit of five or fewer employees. However, the Board intended this exception to be construed narrowly:

> [O]ur intent is to construe the extraordinary circumstances exception narrowly, so that it does not provide an excuse, opportunity or 'loophole' for redundant or unnecessary litigation and the concomitant delay that would ensue. The Board has considered fully and at length all evidence presented and arguments submitted at the rulemaking hearings and during the comment period. None of the referred-to variations between acute-care hospitals … are matters which would qualify for litigation under the special circumstances exception; rather, they are merely minor differences, inherent in the industry due to the multiformity of individual constituent institutions. The Board deems such variations to be ordinary, and hence by definition not extraordinary.

Second NPR (1988), 284 NLRB at 1573-4. The Board went on to list several examples of arguments, including "recent changes within traditional employee groupings and professions, e.g., the increase in specialization among RNs," which would *not* constitute extraordinary circumstances justifying an exception from the rule. *Id.* at 1574. Furthermore, the Board directed, in most instances, that a hospital claiming to fall within the extraordinary circumstances exception should submit an offer of proof to the Hearing Officer, who will decide whether to permit the requested evidence to be adduced. *Id.* The Board explained that such a party would:

> bear the heavy burden to demonstrate that its arguments are substantially different from those which have been carefully considered at the rulemaking proceeding, as, for instance, by showing the existence of such unusual and unforeseen deviations from the range of circumstances revealed at the hearings and known to the Board from more than 13 years of adjudicating cases in this field, that it would be unjust, or an abuse of discretion for the Board to apply the rules to the facility involved.

Id. (internal quotations marks and citations omitted).

Finally, Section 103.30(c) of the Rules also requires that: "Where there are existing non-conforming units..., and a petition for additional units is filed..., the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate units set forth in paragraph (a)." The Board has consequently held that, when an incumbent union representing a non-conforming unit of employees also seeks to represent the "residual" employees in that classification, the union must do so by adding them to the existing unit (by means of a self-determination election), rather than establishing a separate unit. St. John's Hospital, 307 NLRB 767 (1992). This mechanism serves to avoid the undue proliferation of units in the acute care setting, and to bring the units "insofar as practicable" into conformity with the Rules.

Application to the instant case

As stated above, NYSNA seeks to add the nurse practitioners (who are residual to the unit of RNs represented by NYSNA) to the existing RNs unit via a self-determination election. The Employer contends that it would be inappropriate to place nurse practitioners in the unit with other RNs, and appropriate only to place them in a hypothetical unit of other professionals.

I find that the NYSNA's petition comports with the letter and the spirit of the Board's health care unit rules. Specifically, if the majority of nurse practitioners vote for NYSNA, it would create a unit of all registered nurses, which is one of the Board's appropriate hospital units. In my view, there is no reason to believe that these RNs, who also happen to be nurse practitioners, do not sufficiently share interests with the other RNs as found by the Board, including their common supervision by a RN (Elizabeth White), their common licensing requirements as RNs, and their unique concerns regarding staffing and scheduling in the nursing labor market.

Furthermore, as per Section 103.30(c) of the Rules, the nurse practitioner's potential selection of NYSNA as bargaining representative would turn the existing non-conforming unit (less than "all" of the RNs) into a conforming unit (all RNs) under the Rules. In that regard, it would also comport with Congress's admonition against the undue proliferation of units.

It should be noted that the Board included nurse practitioners in a unit with other RNs in Rockridge Medical Care Center, 221 NLRB 560 (1975), a case decided several years before the Board adopted the acute care unit rules. In that case, unlike the instant case, the nurse practitioner position did not require separate licensing beyond the state

licensing for all RNs. Nevertheless, the Board noted that the nurse practitioners are "basically" registered nurses who have received 2 years additional education and are given some additional responsibilities, which are circumscribed by the physicians' approval. 221 NLRB at 561. Although the Board has not addressed the particular issue of nurse practitioners' placement in the RN unit since adopting the Rules in 1989, there is no reason to believe the outcome would be different now. As noted above, the Board thoroughly examined the community of interests among all RNs, and their disparity of interests with other professionals, when it found an all-RN unit appropriate. The Board took into account many aspects of the health care industry, specifically including the increased specialization of RNs, and declared that such specialization would not constitute an "extraordinary circumstance." Although the Employer in this case points out that today's nurse practitioner positions require additional state certification, and their authority is less circumscribed by collaborating physicians than it was in the 1970s, I do not find these changes to show "the existence of such unusual and unforeseen deviations from the range of circumstances revealed at the hearings and known by the Board from more than 13 years of adjudicating cases in this field, that it would be unjust or an abuse of discretion" for the all-RN unit to be applied here. Second NPR,1528 NLRB at 1574.

The Employer further argues that the small size of the group (possibly only five nurse practitioners) constitutes an automatic "extraordinary circumstance" under Section 103.30(a). However, the rule refers to any *unit* of five or fewer employees constituting an extraordinary circumstance, and it is totally irrelevant to this situation. The Petitioner herein does not seek a separate *unit* of nurse practitioners but, rather, seeks to add them

to an existing unit of RNs. Likewise, the Employer does not assert that a separate unit of nurse practitioners is appropriate, but rather seeks to include them in a unit with other professionals. Thus, Congress' concern regarding the undue proliferation of small units does not apply here, and the Employer's argument is misplaced.

Finally, it should be noted there is no labor organization seeking to represent the Employer's proposed unit of all other professionals. Thus, to insist that the nurse practitioners be placed in this hypothetical unit would, in effect, deny them an opportunity to choose collective bargaining representation at this time.

In sum, I have found that the petition herein comports with the Board's health care rules, requiring an all-RN bargaining unit. Adding the residual RN nurse practitioners to the existing RN unit would create a "conforming unit" under the rules. I have further found that, even if all the facts alleged by the Employer are assumed to be true, they would not constitute extraordinary circumstances to justify deviating from an all-RN unit, or even to justify allowing additional litigation beyond the offer of proof.

I shall therefore direct an election among the Employer's nurse practitioners. If a majority of the valid ballots are cast for the Petitioner, those employees will be deemed to have indicated a desire to be included in a combined unit along with the all the other RNs. If a majority of the valid ballots are cast against the Petitioner, the nurse practitioners will be deemed to have indicated the desire to remain unrepresented.

Finally, in order to be eligible as "regular part-time" employees, voters must have worked an average of at least four (4) hours per week during the 13-week period prior to the issuance of this Decision. Sisters of Mercy Health Corp., 298 NLRB 483 (1990); V.I.P. Movers, Inc., 232 NLRB 14 (1977).

Accordingly, I will direct an election among the following voting group:

> All full-time and regular part-time nurse practitioners by the Employer at its Smithtown, New York, facility, but excluding all other employees, guards and supervisors as defined in the Act.

CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding, including the parties' stipulations and in accordance with the discussion above, I conclude and find as follow:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that the Employer is a domestic corporation, with its principal facility located at 50 Route 25A, Smithtown, New York. It is engaged in operating an acute-care hospital. During the past year, which period is representative of its annual operations generally, the Employer derived gross revenues in excess of $250,000, and purchased and received goods at its Smithtown facility valued in excess of $50,000 directly from entities located outside the State of New York.

Based on the parties' stipulation, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer, within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Based on the foregoing discussion, I hereby direct an election among the following voting group:

> All full-time and regular part-time nurse practitioners[5] by the Employer at its Smithtown, New York, facility, but excluding all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the group who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the group may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be

[5] Eligible to vote as "regular part-time" employees are those who have worked an average of at least four (4) hours per week during the 13-week period prior to the issuance of this Decision.

represented for collective bargaining purposes by the New York State Nurses Association.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before **May 12, 2006**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days

prior to the commencement of the election that it has not received the notices. Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by **May 19, 2006**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board website: www.nlrb.gov.

Dated: May 5, 2006.

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